IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: IMPRELIS HERBICIDE MARKETING, SALES PRACTICES AND PRODUCTS LIABILITY LITIGATION	:	**MDL No. 2284** **11-md-02284**
THIS DOCUMENT APPLIES TO: ALL ACTIONS	:	

MEMORANDUM

PRATTER, J. SEPTEMBER 13, 2017

James and Bonnie Stoops appeal the decision of the Imprelis Arborist Panel,[1] claiming that DuPont wrongly denied part of their warranty claim. Because the Appeals Panel decision in the Stoopses' case was neither arbitrary nor capricious, the Court will affirm their decision and deny the Stoopses' appeal.

BACKGROUND

Because the Court has written about the history of this litigation in several opinions, the following summary will be brief.

In the fall of 2010, DuPont introduced Imprelis, a new herbicide designed to selectively kill unwanted weeds without harming non-target vegetation. After widespread reports of damage to non-target vegetation, the Environmental Protection Agency ("EPA") began investigating Imprelis, leading to lawsuits, a suspension of Imprelis sales, and an EPA order preventing DuPont from selling Imprelis. In September 2011, DuPont started its own Claim Resolution Process to compensate victims of Imprelis damage. Despite this voluntary process, various plaintiffs continued to pursue their lawsuits, alleging consumer fraud/protection act

[1] The terms Appeals Panel and Arborist Panel will be used interchangeably in this opinion.

violations, breach of express and/or implied warranty, negligence, strict products liability, nuisance, and trespass claims based on the laws of numerous states. After months of settlement discussions, including mediation, the parties came to a settlement agreement. The details of the settlement relevant to the appeals process will be discussed in greater detail below.

A. The Settlement

The Imprelis Class Action Settlement ("Settlement") covers three classes of Imprelis Plaintiffs. Among the three settlement classes is a property owner class. That class includes all persons or entities who own or owned property in the United States to which Imprelis was applied from August 31, 2010 through August 21, 2011, as well as all persons who own or owned property adjacent to property to which Imprelis was applied and whose trees showed damage from Imprelis on or before the date of entry of the Preliminary Approval Order, or February 11, 2013. Under the Settlement, property owner class members who filed claims by the claims deadline would receive tree removal (or compensation for tree removal), payments for replacement trees, tree care and maintenance payments, and a 15% payment for incidental damages. The Settlement included a warranty that provided for all benefits but the 15% incidental damages award for Imprelis damage that manifested after the claims period closed but before May 31, 2015.

Section III.C.1.a.xi. sets forth the appeals process for property owner class members who file settlement claims. *See* Docket No.117-2, § III.C.1.a.xi. That provision sets the framework for the "Imprelis Alternative Dispute Resolution Panel," comprised of three arborists – one chosen by DuPont, one chosen by Interim Co-Lead Counsel and Liaison Counsel, and one chosen by the other two arborists. The Agreement describes the Panel's role as "review[ing] and determin[ing] appeals from the Settlement Claim Process, and decisions by DuPont relating to

objections submitted in the course of the Imprelis Claim Resolution Process." The Agreement limits the authority of the Panel to "resolving questions or challenges relating to determinations of: (a) tree ratings; (b) the height, and if applicable, the circumference of trees at issue for valuation and tree care respectively; (c) the number of trees qualifying for compensation from DuPont under the Settlement Claim Process; (d) whether a Class Member has provided adequate Spray Records; (e) warranty coverage; and (f) application of those requirements set forth in Exhibit 19 [outlining the types of symptoms found in Imprelis-injured trees and the types of evidence required for claim consideration]." *Id.* The Agreement also specifies that the Panel members will be subject to the Code of Ethics for Arbitrators in Commercial Disputes and that the evidence they consider must be that presented by the parties. In the context of discussing Panel review, the Agreement states that "Any Party maintains its rights to seek review from the Court." *Id.* The Agreement does not set forth the standard of review to be applied by the Court in reviewing Panel determinations. The form filed by claimants appealing Panel decisions limits Court review to the record submitted to the Panel.

On February 12, 2013, this Court preliminarily approved the Settlement, and on September 27, 2013, the Court held a Final Fairness Hearing to determine whether the Settlement provided fair, reasonable, and adequate compensation to class members. On October 17, 2013, the Court granted the Class Plaintiffs' Motion for Final Approval of the Settlement. The Order entering final judgment as to the Settlement states that class members are "permanently enjoined and barred from instituting, commencing, or prosecuting any action or other proceeding asserting any Released Claims, against any Releasee . . . by whatever means, in any local, state, or federal court, or in any agency or other arbitral or other forum . . . ." February

5, 2014 Order, Docket No. 274, ¶ 7. The Court also retained exclusive jurisdiction over any action relating to the Settlement:

> Without affecting the finality of this Order, the Court shall retain jurisdiction over the implementation, enforcement, and performance of the Settlement Agreement, and shall have exclusive jurisdiction over any suit, action, motion, proceeding, or dispute arising out of or relating to the Settlement Agreement or the applicability of the Settlement Agreement that cannot be resolved by negotiation and agreement by Plaintiffs and DuPont.

Id. at ¶ 11.

B. *James and Bonnie Stoops's Appeal*

James and Bonnie Stoops submitted a warranty claim, seeking compensation for Imprelis-related damage to five trees, four of which were previously recommended for tree care. A DuPont arborist visited their property and found that one tree had significantly worsened, two had improved, and two did not show signs of Imprelis-related damage. DuPont made an offer to resolve the warranty claim in line with these observations. The Stoopses then objected to the offer, contending that two trees (trees #14 and #15, which the arborist had listed as not showing signs of Imprelis damage), were so badly damaged that they should be removed and replaced. DuPont denied the objection, and the Stoopses appealed to the Arborist Panel. With their appeal, they submitted photographs that they claim show significant damage to trees #14 and #15. After reviewing the information submitted, the Panel denied their appeal.

LEGAL STANDARD

DuPont urged the Court to adopt the standard of review used for arbitration, meaning that the Arborist Panel's fact finding should only be displaced when "there was evident partiality or corruption in the arbitrators," where the arbitrators "refus[ed] to hear evidence pertinent and material to the controversy," or "where the arbitrators exceeded their powers." *See* 9 U.S.C. § 10. Courts have described this standard as making arbitration decisions "substantially

unreviewable." *See Del. Dept. of Health & Social Servs., Div. for Visually Impaired v. U.S. Dept. of Educ.*, 772 F.2d 1123, 1128 (3d Cir. 1985). Many of the appellants, by contrast, either implicitly or explicitly expect *de novo* review.

The Settlement Agreement is silent on this issue. The Court will chart a middle course. On the one hand, DuPont is correct that deference is due to the Arborist Panel's expertise, particularly because the panel was assembled in a fashion intended to be neutral, with each party choosing one arborist and those two arborists selecting a third, and because the Arborist Panel clearly was intended to provide an alternative dispute resolution mechanism to streamline the appeals process, save all parties time and money, and reach resolutions as swiftly as possible. On the other hand, the parties carefully crafted the Settlement Agreement and yet still failed to include any explicit guidance to class members or to the Court regarding a standard of review, thereby giving class members no direct notice of what they would encounter at this level of review. This is an especially frustrating failure given the unique nature of this settlement. Indeed, a search of other multidistrict litigation and class action practice has yielded little helpful guidance or authority.

Taking this middle course, the Court will apply an "arbitrary and capricious" standard of review. *See Del. Dept. of Health & Human Servs.*, 772 F.2d at 1128 (distinguishing standard of review under the Federal Arbitration Act from "arbitrary and capricious" standard); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 268 (7th Cir. 2006) (contrasting "arbitrary and capricious" standard with standard applied in review of arbitration award). That is, factual findings and conclusions drawn by the Arborist Panel will be set aside only if they are "without reason, unsupported by substantial evidence or erroneous as a matter of law." *See Miller v. Am. Airlines, Inc.*, 632 F.3d 837, 845 (3d Cir. 2011) (internal quotations omitted). Such a standard gives effect

to the parties' clear intent that the Arborist Panel's role be more than merely advisory and recognizes their expertise and neutrality, while still giving class members an opportunity for a more meaningful review of the Panel's decisions.

DISCUSSION

The Stoopses argue that two of their trees are now completely dead and that Imprelis caused the damage to their trees. In particular, they take issue with the Panel's statement that "[f]rom an application of Imprelis in the spring of 2011 and adverse effects observed in 2011, based on the Mode of Action of Imprelis it is not possible to cause the death of a tree 4 years later with no symptoms observed in between." The Stoopses contend that the statement is inaccurate when it states that adverse effects were observed in 2011, in that no symptoms were observed until the Spring of 2013. They also attach various documents which they claim support the view that Imprelis remains in the soil and in trees for long enough to cause a delayed reaction.

Beginning with this last point first, the documents included with this appeal regarding how long Imprelis remains in soil and tree samples were not included with the Stoopses' appeal to the Arborist Panel. The role of this Court is not to conduct a *de novo* review of the claim, but rather to determine whether the Arborist Panel acted arbitrarily or capriciously based on the evidence they had before them. Therefore, the Court will not consider any evidence that was not first submitted to the Panel.

As to the error in the Panel's statement regarding when damage first manifested, that mistake does not change the substance of the Panel's denial. The Panel also noted that photographs from 2013 show tree # 14 with full foliage and no Imprelis symptoms and that photographs from 2015 show tree # 15 with full foliage and minor wilting with no Imprelis

symptoms. Without evidence of a progression of Imprelis symptoms, the Appeals Panel determined that it was impossible for Imprelis to have been the cause of the trees' death. The Court does not find this conclusion to be arbitrary or capricious. Indeed, the Stoops have not presented any evidence from which the Court can conclude the Imprelis was the direct cause of their trees' demise.

CONCLUSION

For the foregoing reasons, the Court will affirm the Arborist Panel decision and deny the James and Bonnie Stoops's appeal. An appropriate order follows.

BY THE COURT:

GENE E.K. PRATTER
United States District Judge